

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





77-2133

To be argued by  
SUSAN N. HERMAN

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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ROBERT J. ENRIGHT,

PETITIONER-APPELLEE,

-v.-

UNITED STATES OF AMERICA,

RESPONDENT-APPELLANT.

---

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

---

BRIEF FOR PETITIONER-APPELLEE

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No. 77-2133

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-v.-

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BRIEF FOR PETITIONER-APPELLEE

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PRELIMINARY STATEMENT

This is an appeal by the United States of America from an order entered September 14, 1977, in the United States District Court for the Southern District of New York (Hon. Charles M. Metzner, J.), granting petitioner-appellee Robert Enright's motion to vacate his conviction pursuant to 28 U.S.C. §2255, and to dismiss the underlying indictment, 74 Cr. 1152, on the ground that the conviction was obtained in violation of Article IV(e) of the Interstate Agreement

on Detainers, 18 U.S.C. Appendix.\* The July 13, 1977 opinion of Judge Metzner on which this order was based has been reported at 434 F.Supp. 1056, and is reproduced in the Joint Appendix [hereinafter "JA"] at 172.

#### STATEMENT OF FACTS

On or about November 15, 1974, a federal detainer was lodged against Robert Enright at the Green Haven Correctional Facility, where Enright was in New York State custody. (JA at 10-12). Enright received a notification of the pending detainer from the institution advising him of his right to request a prompt resolution of the underlying charges, but not mentioning the Interstate Agreement of Detainers, or the rights set forth in Article IV(e) thereof. (JA at 121-122). Upon receipt of this notification, Enright wrote to the Court requesting a speedy trial. (JA at 13).

Enright was produced in the Southern District of New York, pursuant to a writ of habeas corpus ad prosequendum issued under the pending detainer, on December 24, 1974, and was lodged at the Federal Detention Headquarters at West Street. On December 30, 1977, he was arraigned on Indictment 74 Cr. 1152, before Honorable Thomas P. Griesa, and entered a not guilty plea. Enright was not represented at this initial proceeding by his subsequent trial attorney, Gordon Lang. Indeed, Lang was not retained until January, 1975 (see JA at 13), and the docket sheets reveal that Lang did not file a notice of appearance until January 21, 1975. Indictment 74 Cr. 1152 was assigned to Honorable Charles M. Metzner for all purposes.

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\* Article IV(e) provides:

If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.



On January 24, 1975, allegedly in response to a telephone call from Attorney Lang, the Assistant United States Attorney "proceeded immediately that day to have the writ of habeas corpus ad prosequendum satisfied by the Part I judge . . . [who] was not the judge to whom this case was assigned." (434 F.Supp. at 1057; JA at 174). Enright was not produced in open court in connection with this satisfaction of the writ, and Judge Metzner was not advised of this proceeding, although the Assistant was aware that the case had been assigned to Judge Metzner. (JA at 164).

As petitioner testified at the evidentiary hearing held below, he had not authorized his counsel to request his return to state custody (JA at 137-138, 143); he never knew that Lang had made any such request, either before or after the January 24, 1975 telephone call (JA at 138, 142); and he was totally unaware of his rights under Article IV(e) (JA at 143). Enright also testified at the hearing below about circumstances which clearly evinced his desire to remain in federal custody pending his trial. Enright had escaped from the Green Haven Correctional Facility in November, 1974, and had only recently been convicted of escape in the state courts. (JA at 126-127). Besides the criminal prosecution, Enright had been subjected to institutional disciplinary proceedings on a charge of escape and sentenced to sixty days in the segregation unit "with review" (signifying that after sixty days the sentence of segregated confinement might be further extended). (JA at 127).

In December, 1974, when Enright was brought into federal custody, he had been confined to the punitive segregation unit at Green Haven, and still had a substantial portion of his administrative sentence to serve (JA at 129-131, 134). Thus, when Enright was returned from Federal Detention Headquarters in Manhattan to Green Haven, he was returned to the highly restrictive conditions

of a maximum security punitive segregation unit. (JA at 140-41). This incident and the relevant dates were corroborated by records from the institutional clerk's office which were admitted into evidence at the hearing. (JA at 128-29; 130-31).

Further, Enright had seen his attorney only briefly before his return to state custody (JA at 135-36), and did not see his attorney at all from the time of his return to Green Haven until he was brought back to Federal Detention Headquarters several days before trial began. (JA at 141-42). In fact, two weeks after being returned to state custody, Enright was transferred from Green Haven to the Attica Correctional Facility, even further from the site of his trial and his attorney. (JA at 141). Enright also testified at the hearing that he wished to remain in federal custody until his federal trial (JA at 139), that he had not requested a transfer of his attorney or anyone else (JA at 143), and that he was not aware of the provisions of Article IV(e) of the Interstate Agreement on Detainers giving him a right to remain in federal custody pending trial, until he read in the newspaper about Judge Bartels' decision in United States v. Mauro, 414 F.Supp. 358 (E.D.N.Y.), aff'd., 544 F.2d 588 (2d Cir. 1976), cert. granted, 46 U.S.L.W. 3183 (October 4, 1977). (JA at 143).

Enright was returned to New York state custody in January and subsequently produced again, pursuant to another writ of habeas corpus ad prosequendum, for trial on Indictment 74 Cr. 1152. (JA at 21). After conviction and sentence, Enright sought assignment of counsel to prosecute an appeal. His assigned appellate counsel moved to be relieved, however, and filed a brief under Anders v. California, 386 U.S. 738 (1967), asserting that counsel could find no non-frivolous issues to raise on appeal. The Court granted the motion and affirmed Enright's conviction. Enright v. United States, 75-1235 (order of October 22, 1975).



The proceedings below on the instant motion are recounted in appellant's brief at 3-5.

#### ARGUMENT

##### I. THE DISTRICT COURT CORRECTLY FOUND THAT PETITIONER-APPELLEE'S RIGHTS UNDER THE INTER-STATE AGREEMENT ON DETAINERS WERE VIOLATED.

As the District Court found, the record clearly shows that the Government obtained custody of Robert Enright for trial on Indictment 74 Cr. 1152 by issuing a writ of habeas corpus ad prosequendum pursuant to a pending detainer, and then returned Enright to state custody without having tried him. (JA at 87-89). This sequence of events was established by the court records in United States v. Enright, 74 Cr. 1152 (JA at 10-21), and also by the testimony of the Government's own witness at the evidentiary hearing held herein on June 13, 1977. (JA at 154-64).

As this Court recognized in United States v. Mauro, 544 F.2d 588, 591 n.3 (2d Cir. 1976), cert. granted, 46 U.S.L.W. 3183 (October 4, 1977), all that is required to state a claim under Article IV(e) of the Interstate Agreement on Detainers is to "'allege that one jurisdiction has requested [a defendant's] transfer from another jurisdiction for trial and returned him without trying him to the first jurisdiction.'" United States v. Cappucci, 342 F.Supp. 790, 793 (E.D.Pa. 1972)." See also United States v. Cyphers, 556 F.2d 630, 635 (2d Cir. 1977). Article IV(e) of the Agreement is violated by the simple act of retransfer prior to trial because "Article IV(e) creates no exceptions to the requirement that the defendant not be returned to state custody untried." Mauro, supra, at 592 n.6, citing United States v. Ricketson, 498 F.2d 367, 373 (7th Cir.), cert. denied, 419 U.S. 965 (1974); see United States v. Sorrell, 413

F.Supp. 138, 141 (E.D. Pa. 1976), aff'd., 562 F.2d 227 (3d Cir. 1977) (en banc).\*

The District Court was also clearly correct in finding that dismissal of the indictment is the required remedy where a violation of Article IV(e) is established. Cyphers, supra at 635; Mauro, supra at 595; United States ex rel. Esola v. Groomes, 520 F.2d 830 (3d Cir. 1975). This result is compelled by the language of Article IV(e), which specifies that the Court "shall enter an order dismissing [the indictment] with prejudice."

Throughout the proceedings in the District Court and in this Court, the Government has never contested the validity of Enright's claim on the merits. The Government's response has been limited to arguments that the courts should not hear Enright's claim for a variety of procedural reasons. If, as appellee submits, the District Court's decision to hear the claim on its merits was sound, the result is ineluctable and the order below must be affirmed.

II. A VIOLATION OF THE INTERSTATE AGREEMENT ON DETAINERS MUST BE COGNIZABLE UNDER TITLE 28, UNITED STATES CODE, SECTION 2255.

The District Court, after considering the Government's contention that petitioner-appellee's claim was not cognizable under 28 U.S.C. §2255, concluded that the claim was properly raised on the instant motion (JA at 176). Since the date of Judge Metzner's decision below, this Court decided Edwards v. United States, Dkt. No. 77-2048, slip op. at 123 (October 25, 1977), re-

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\* As Judge Metzner found, Mauro does not control this case because there was an actual detainer filed against petitioner-appellee herein. Mauro's holding that a writ of habeas corpus ad prosequendum itself constitutes a detainer within the meaning of the Agreement, and that the Agreement provides the exclusive means for acquiring custody of another jurisdiction's prisoner, is not relevant or necessary where an actual detainer was lodged. See United States v. Ford, 550 F.2d 732, 742 (2d Cir. 1977), cert. granted, 46 U.S.L.W. 3183 (October 4, 1977). Therefore, the District Court correctly found that, as in Ford, there is no issue in this case concerning the retroactivity of Mauro. (See JA at 207-10).



fusing to consider a claimed violation of the Agreement on a §2255 motion. For the reasons discussed below, petitioner respectfully submits that the result reached by the District Court herein is more consistent with the language of §2255, the policies underlying that statute, the intent of Congress in enacting the Interstate Agreement on Detainers, prior Supreme Court and Second Circuit case law, and the weight of authority in other jurisdictions. Therefore, petitioner respectfully urges this Court to reconsider the decision in Edwards.\*

The question of the scope of review under §2255 is undeniably of exceptional importance and also of considerable complexity. Edwards prosecuted his appeal pro se and the Edwards Court therefore chose to confront this issue without the benefit of a brief from counsel and without oral argument. The Edwards Court's statement that "we think it preferable to affirm on the broader basis that a claim based on a violation of IAD [the Interstate Agreement on Detainers] is not within 28 U.S.C. §2255," id., slip op. at 125 was unnecessary to the decision of Edwards' appeal. The Court already had endorsed the District

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\* Cf. United States v. Alessi, 544 F.2d 1139, 1143-44 (2d Cir. 1976) (reconsidering a recent decision of the Court where relevant case law had not been cited to the original panel).

In the alternative, appellee respectfully suggests a hearing or rehearing en banc on this issue. See Western Pacific Ry. Corp. v. Western Pacific Ry. Co., 345 U.S. 247, 259 (1953). En banc consideration is appropriate where, as here, the issue involved is of great significance to a class of litigants, the panel whose decision has become the law of the Circuit reached a questionable result, other jurisdictions have disagreed with the panel's ruling, and en banc consideration would be necessary to maintain uniformity of decisions in the Circuit. See 9 J. Moore, Federal Practice ¶235.02 at 4103 (2d ed. 1975); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1021-26 (2d Cir. 1973) (Oakes, J., dissenting from denial of rehearing en banc), vacated on other grounds, 417 U.S. 156 (1974). Although Mauro, supra, and Ford, supra, are being heard by the Supreme Court, both of those cases are direct criminal appeals and do not raise the issue concerning §2255 presented herein. Compare Eisen, supra at 1020-21.

Court's conclusion that any claim Edwards might have had was waived by his plea of guilty. Id. Also, Edwards' claim would have been barred under this Court's earlier ruling in United States v. Chico, 558 F.2d 1047 (2d Cir. 1977), because Edwards' brief appearances in federal court did not amount to a transfer of custody. See Edwards, supra, slip op. at 124-25. Because Edwards would have been precluded from raising this issue in any event, the "broader," more important, and more complex questions concerning the scope of §2255 easily could have been left for resolution in a case where both sides were represented by counsel.

Finally, the decision in Edwards applies dicta from Supreme Court cases to reach a conclusion that neither the Supreme Court nor this Court has ever before reached: that the courts may decline to consider a claim that a person is in custody in violation of a clear and unequivocal law of the United States if the courts disagree with Congress' judgment about the importance of the law.

#### A. Background -- The Scope of Habeas Corpus Jurisdiction

28 U.S.C. 2255, in pertinent part, states that a motion to vacate sentence may be made by a federal prisoner

claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack . . . .

This provision was intended to supply a statutory substitute for the writ of habeas corpus, and its scope was intended to be exactly commensurate with the scope of the writ. See H.R. Rep. 308 at A180, 80th Cong., 1st Sess. (1947); Blackledge v. Allison, \_\_\_ U.S. \_\_\_, 97 S.Ct. 1621, 1629 n.4 (1977); Swain v. Pressley, \_\_\_ U.S. \_\_\_, 97 S.Ct. 1224, 1228 (1977); Davis v. United



States, 417 U.S. 333, 343 (1974); Kaufman v. United States, 394 U.S. 217, 222 (1969); United States v. Hayman, 342 U.S. 205, 210-19 (1952). As many commentators have noted, judicial interpretation of the scope of jurisdiction in collateral proceedings has undergone a steady expansion. See Hart, Foreword, The Time Chart of the Justices, 73 Harv. L. Rev. 84 (1959); Oaks, Legal history in the High Court -- Habeas Corpus, 64 Mich. L. Rev. 451 (1966); Note, Developments in the Law -- Federal Habeas Corpus, 83 Harv. L. Rev. 1038 (1970) [hereinafter "Developments"].

Earliest constructions of the scope of habeas corpus review are exemplified by Chief Justice Marshall's statement in Ex parte Watkins, 28 U.S. (3 Pet.) 193, 203, 7 L. Ed. 650, 653 (1830):

An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.

Gradually, the courts expanded the definition of what constituted a jurisdictional defect, rendering habeas corpus relief more broadly available, see Ex parte Wells, 59 U.S. (18 How.) 307, 15 L.Ed. 421 (1855); Ex parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1874); see also Moore v. Dempsey, 261 U.S. 86, 67 L.Ed. 543 (1923); Frank v. Mangum, 237 U.S. 309, 59 L.Ed. 969 (1915); Developments, supra at 1045 et seq. In Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717 (1880), the Court concluded that a challenge to a conviction on constitutional grounds was cognizable on habeas corpus. And in Waley v. Johnston, 316 U.S. 101, 104-05 (1942), the Court acknowledged that the concept of jurisdictional defects no longer delimited the scope of review in collateral attacks.

Throughout this process of expansion, the Supreme Court viewed each case strictly on its facts and, of necessity, often discarded or disregarded

dicta in earlier cases which would have seemed to indicate that each new claim raised was not cognizable. In considering a claimed jurisdictional defect, the Court would frequently state that nonjurisdictional defects might not be raised on collateral attack but, where a nonjurisdictional defect was subsequently presented, the Court analyzed the novel claim with regard to the ultimate purposes of the habeas corpus statute and the facts of the case, rather than considering itself bound by earlier dicta. Compare Watkins, supra, with Siebold, supra, and Waley, supra.

More recently, in Kaufman v. United States, supra, the Supreme Court held that a constitutional claim may be raised for the first time in a §2255 proceeding, despite earlier dicta to the effect that "the writ of habeas corpus will not be allowed to do service for an appeal." Sunal v. Large, 332 U.S. 174, 178 (1947). The Kaufman Court distinguished Sunal on its facts, explaining that Sunal had involved a nonconstitutional claim, and treating the apparently broad statement in Sunal as limited in application to the facts of that case.

Similarly, in Davis v. United States, supra, the Court again distinguished earlier cases which, if read literally, would seem to preclude the statutory claim found cognizable therein. Id. at 345-47. Prior to Davis, both commentators and courts had concluded that under Sunal, supra, and Hill v. United States, 368 U.S. 424 (1962), claims not based on the Constitution or on jurisdictional defects could not be raised on §2255 motions. See Bator, Shapiro, Mishkin & Wechsler, Hart & Wechsler's The Federal Courts and the Federal System, 1529-31 & 1531 n.9 (2d ed. 1973).

Because of the Court's process of expansion and distinction of earlier cases, habeas corpus law is rife with dicta which can be taken out of context to justify exclusion of virtually any claim from consideration on its merits.



However, the Supreme Court's approach to interpretation of the scope of jurisdiction on habeas corpus, and general principles of statutory construction, show that the touchstones of analysis of novel claims raised on §2255 motions must be §2255 itself, the factual contexts of earlier cases, and the nature of the claim raised.

B. The Claim that Petitioner-Appellee is in Custody in Violation of a Law of the United States Must Be Cognizable Under Section 2255.

Section 2255 by its clear and unequivocal language allows challenges to convictions on the ground that custody is in violation of the "laws of the United States." The Interstate Agreement on Detainers is unquestionably a "law of the United States." See Edwards, supra, slip op. at 126 n.2. In Davis, supra, the Supreme Court held that, despite earlier dicta, claimed violations of the "laws of the United States" may be raised on §2255 motions. Moreover, in every reported decision discovered by counsel, other jurisdictions uniformly have disagreed with the Edwards court and have found that a claim under the Interstate Agreement on Detainers is cognizable on habeas corpus as a claim of custody in violation of a law of the United States. United States ex rel. Esola v. Groomes, supra; Beebe v. Vaughn, 430 F.Supp. 1220 (D. Del. 1977); Stroble v. Egeler, 408 F.Supp. 630 (E.D.Mich. 1976), rev'd & remanded on other grounds, 547 F.2d 339 (6th Cir. 1977).

The Edwards court did not dispute any of these simple propositions. The sole justification offered for the result in Edwards was dicta from Hill v. United States, supra at 428, which the Edwards court chose to interpret as a "gloss" on the language of §2255. Edwards, supra at 126. According to the Edwards court, a claim that a conviction was imposed in violation of a law of the United States or is otherwise subject to collateral attack, may be

raised in a §2255 motion only if the alleged error constitutes a "fundamental defect which inherently results in a complete miscarriage of justice" and presents "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." Id., slip op. at 126, quoting Hill, supra at 428.\*

While Hill does indeed contain the quoted language, these comments have never been presented or used by the Supreme Court as a blanket limitation on the availability of the remedy provided by §2255. In addition, the guidelines set forth by Hill are most logically interpreted as an attempt to define the meaning of the phrase "otherwise subject to collateral attack" -- the catchall phrase of §2255 -- and should not apply to impose obstacles to asserting a violation of a clear "law of the United States." Finally, the rationale of Hill, that some claims are not of the "character or magnitude" appropriate for consideration on §2255 motions, does not justify precluding a claimed violation of a law whose significance has already been judged by Congress.

#### 1. The Applicability of Hill

The Edwards Court suggested that the dicta from Hill are guidelines giving content to the "murky language" of §2255 that the motion may be used to raise a claim that a conviction was in violation of "laws of the United States" or "otherwise subject to collateral attack." Id., slip op. at 126. Guidelines are indeed necessary to define the meaning of "otherwise subject to collateral attack," but "laws of the United States" cannot fairly be char-

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\* The question considered in Edwards was not whether the court has jurisdiction to hear certain claims on §2255 motions. It is clear that the courts have power to hear the claim, and that any limitations imposed are only standards guiding the exercise of the court's discretion. See Kaufman, supra at 220 n.3; Sunal, supra at 179-80; United States v. Loschiavo, 531 F.2d 659, 666 (2d Cir. 1976).



acterized as a murky phrase. Hill, which involved an alleged violation of a rule of criminal procedure, should be interpreted as a construction of the meaning of "otherwise subject to collateral attack," cf. United States v. Fischer, 381 F.2d 509, 512 (2d Cir. 1967), cert. denied, 390 U.S. 973 (1968), and its grounds should not even apply where a violation of the "laws of the United States" is asserted.

The claim raised by petitioner Hill was a technical denial of his right to allocution under F.R. Crim. P. 32(a), in that the trial judge had neglected to ask him personally whether he wished to speak before being sentenced. Hill did not allege that the trial judge in any way prevented him from speaking, or that he had anything he wished to say on his own behalf. Id. at 429. The Court, concerned with deterring a flow of motions to vacate sentence or motions for new trials based upon trivial errors at trial or at sentence, decided that the error Hill asserted was too superficial to warrant relief on collateral attack. The Court, noting that Hill had not alleged an affirmative denial of his right of allocution, stressed that it was not deciding whether a true violation of Rule 32(a) would be found to state a cognizable claim under §2255. Id. at 429; Developments, supra at 1068-69. In the course of concluding that this merely "formal" failure to comply with procedural requirements of Rule 32(a) was not sufficient ground for vacating Hill's sentence, the Court indicated that its decision might have been different if the asserted error had been constitutional or jurisdictional, if the error had engendered a fundamental defect resulting in a miscarriage of justice, or if exceptional circumstances had been present. Id. at 428.

The Court did not state that all of these factors -- or any one of them -- were necessary features of a claim cognizable on a §2255 motion. These general

statements of guidelines which would entitle a claim to consideration were not presented as an exclusive list of the only circumstances under which a claim would be considered. Since Hill was decided, the Supreme Court has never used these comments as a basis for precluding a claim from consideration. These dicta have been quoted in Supreme Court cases where relief was granted under §2255. Davis, supra; Kaufman, supra.

There is little case law in the Supreme Court or in this Circuit considering actual violations of "laws of the United States,"\* Most cases brought under §2255 raise constitutional claims, or claims relating to violations of the rules of criminal procedure.\*\* Cf. Losinno v. Henderson, 420 F.Supp. 380, 383 (S.D.N.Y. 1976). Thus, cases in this Court discussing the scope of §2255 have involved claims which would fit into the catchall phrase of §2255 -- "otherwise subject to collateral attack." Most of these cases have dealt with the question of application of court-made rules and constructions. In Alfano v. United States, 555 F.2d 1128 (2d Cir. 1977), for example,

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\* Cases in this Circuit decided before Davis, supra, had concluded that a nonconstitutional, nonjurisdictional claim could never be raised on a §2255 motion. See, e.g., United States v. Spada, 331 F.2d 995 (2d Cir. 1964), cert. denied, 379 U.S. 865 (1965). Since Davis, the Court has recognized the growth of the law in this area. See, e.g., United States v. Travers, 514 F.2d 1171, 1173 (2d Cir. 1974). The Court has also been receptive to other non-constitutional, nonjurisdictional claims. In Del Vecchio, supra, the Court left open the question of whether violations of Fed. R. Crim. P. 11 are cognizable on §2255 motions, id. at 110, acknowledging that the Circuit has in the past considered claimed violations of Rule 11 on §2255 motions, see Ferguson v. United States, 513 F.2d 1011 (2d Cir. 1975); Michel v. United States, 507 F.2d 461 (2d Cir. 1974); Bye v. United States, 435 F.2d 177 (2d Cir. 1970), as has the Supreme Court, see Halliday v. United States, 394 U.S. 831 (1969).

\*\* Claims of violation of these rules cannot often be raised successfully on collateral attack because the Federal Rules of Criminal Procedure carry their own waiver rule, Rule 12, which generally precludes later assertion of claims not raised pretrial. The Interstate Agreement on Detainers, of course, is not governed by Rule 12, see Cyphers, supra at 634.



the Court declined to apply a court-made exclusionary rule on a §2255 motion when the result would have been to allow petitioner a new trial merely because there had been a delay in sealing wiretap evidence used at the trial.

In Del Vecchio v. United States, 556 F.2d 106 (2d Cir. 1977), the Court decided not to extend application of the rule of United States v. McCarthy, 394 U.S. 459 (1969) (where the Supreme Court established a stringent penalty for failure to comply with the procedural requirements of Fed. R. Crim. P. 11) to a §2255 petitioner who had not been advised of certain consequences of his guilty plea. In both of these cases, the Court determined that the prophylactic purposes of these court-made rules would be adequately served even if claims based on these rules could not be raised on collateral attack. In such circumstances, where the courts are defining the scope of a vague provision of §2255 and implementing court-made rules, the guidelines derived from Hill are both necessary and helpful. But this proper exercise of judicial discretion does not justify using these guidelines to impose barriers to consideration of violations of "laws of the United States" where Congress has not imposed any such limitations.

Other courts to have considered the claim raised in Edwards have reached this conclusion. The Third Circuit, in Esola, supra, found that an asserted violation of Article IV(e) of the Agreement was a claim of violation of the laws of the United States, considered the claim on the merits, and granted relief. The court did not impose any additional requirement that petitioner show a complete miscarriage of justice, but deemed it sufficient that he had established a violation of a law of Congress.\* See id. at 834-35. In Beebe, supra, and Stroble, supra, the courts reached the same result, on the basis

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\* This Court, in Mauro, supra, endorsed the reasoning of the Third Circuit in Esola, following that court's interpretations of the Interstate Agreement on Detainers.

of the same straightforward analysis. Cf. Wingo v. Ciccone, 507 F.2d 354, 357 n.11 (8th Cir. 1974). All of these cases were federal habeas corpus petitions brought by state prisoners on the ground that a state had violated their rights under the Agreement. The scope of jurisdiction under §2255 is exactly commensurate with the scope of jurisdiction under §2254, see Davis, supra at 343; Hayman, supra at 210-19, so a claimed violation of a law of the United States which may be raised by a state prisoner necessarily may be raised by a federal prisoner. In fact, considerations of comity pose greater reason to decline to consider claims raised by state prisoners based on a state's violation of their rights. See Stone v. Powell, 428 U.S. 465 (1976).

Thus, the Edwards Court imposed novel restrictions upon consideration of asserted violation of laws of the United States which other courts have found unnecessary and inappropriate, even where the claim is raised by a state prisoner. The Supreme Court has recently expressed its disfavor of blanket rules designed to preclude consideration on the merits of claims raised on collateral attacks, see Blackledge, supra at 1629.\* The Hill dicta, applicable to aid the courts in determining which claims are "otherwise subject to collateral attack," cannot, consistent with the weight of authority in other jurisdictions, be taken as a license to eschew consideration of a violation of a law of the United States.

## 2. The Nature of the Right Asserted

Even if Hill is not interpreted as an attempt to define "otherwise subject to collateral attack," and is construed as applying to claims involving

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\* "In administering the writ of habeas corpus and its §2255 counterpart, the federal courts cannot fairly adopt a per se rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were . . . the product of [impermissible] factors . . . ." Id.



"laws of the United States," the claim under Article IV(e) of the Interstate Agreement on Detainers is properly heard under the rationale of Hill, because it is not a trivial error of the type deplored therein. Hill appears to be the only occasion on which the Supreme Court declined to hear a claim on the ground that the asserted claim was not of the "character or magnitude," id. at 428, warranting relief on collateral attack. This decision was based on the Court's conclusion that Hill had not even alleged a true violation of his right of allocution under Rule 32(a).

The superficial nature of Hill's claim for relief can be clarified by considering what would have happened had the Court granted his motion. Hill's sentence would have been vacated, and he would have undergone a new sentencing procedure at which the trial court would have inquired whether he wished to say anything on his own behalf. It appeared, from the papers Hill had submitted to the courts on his §2255 motion, that Hill did not have anything to say. Thus, by denying Hill's motion, the Court merely declined to afford Hill what was destined to be nothing more than a meaningless and unnecessary repetition of his sentencing proceeding.

Violation of Article IV(e) of the Interstate Agreement on Detainers, by way of contrast, is not a hollow or insignificant claim. It is both unnecessary and inappropriate for the courts to assess the importance of the right granted by this section, because Congress has already done so. As this Court recognized in Mauro, supra, and Ford, supra, the legislative history of the Agreement reflects Congress' concern with the difficulties engendered by transfers of custody effected without the beneficial provisions of the Agreement. Article IV(e) is exceptionally clear and unequivocal in its commands, and the sanction imposed for violation of its terms is both mandatory and harsh. The applicable principles of statutory construction compel

the courts to give effect to Congress' clear statement of its intent. First, "[t]here is a presumption against construing a statute as containing superfluous or meaningless words or giving it a construction that would render it ineffective." United States v. Blasius, 397 F.2d 203, 207 n.9 (2d Cir. 1968) (citations omitted), cert. dismissed, 393 U.S. 1008 (1969). Further, Article IX of the Interstate Agreement on Detainers itself provides that the Agreement "shall be liberally construed so as to effectuate its purposes." See Cyphers, supra at 635. Even if the courts believe that Congress erred in providing so harsh a sanction for violation of Article IV(e), it is not the court's role to "extricate the United States from the unequivocal terms of the Agreement enacted by the Congress." Mauro, supra at 595; see Ford, supra, at 744.

Robert Enright suffered precisely the series of events Congress prohibited in Article IV(e): he was brought from state to federal custody for trial, and was returned to state custody without having been tried. According to the clear language of Congress, Indictment 74 Cr. 1152 thereupon lost all "force or effect" and the Court was required to enter an order dismissing the indictment. Had the District Court or Court of Appeals considered this violation of Article IV(e) during the original criminal proceeding, it is clear that the indictment would have been properly dismissed. The fact that Enright did not specifically raise this claim during an earlier proceeding does not reflect upon the importance of the claim. The question of whether this claim is properly raised on a §2255 motion should focus only on the question of whether the claim should be deemed to have been waived.\*

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\* See discussion at pp. 21 - 26 , infra.



Thus, Enright's claim is not precluded from consideration on §2255 as a trivial or hollow claim under the rationale of Hill, because Enright has suffered a clear loss of the rights guaranteed by Article IV(e), and Congress has already deemed those rights to be substantial enough to warrant strong sanctions.

In sum, precedent affords no justification for imposing tests of substantiality or prejudice which must be passed before a violation of a law of the United States may be raised on a §2255 motion. The Hill dicta are not exclusive tests; the rationale of Hill should not even apply to a clear claim of violation of a law of the United States, rather than to a conviction "otherwise subject to collateral attack;" and Hill itself is highly distinguishable where the claim at issue is a violation Congress has judged to be substantial.

C The Claim That the Court Was Without Jurisdiction to Impose Sentence on Petitioner-Appellee Must Be Cognizable Under Section 2255.

The District Court provided a different rationale for finding petitioner's claim cognizable under §2255: not only was petitioner's conviction clearly in violation of a law of the United States, but the court was without jurisdiction to impose sentence. (JA at 172). As this Court has recognized in the past, whatever limitations may be imposed on challenges to convictions "otherwise subject to collateral attack" or even to convictions in violation of a law of the United States, "claims based upon constitutional errors or on a lack of jurisdiction, in the broad sense of the court's power to adjudicate the issues," are not subject to the same limitations. Loschiavo, supra at 662-63; see Hill, supra at 428-29 (distinguishing jurisdictional claims); Sunal, supra at 179 (distinguishing "errors which do not cross the jurisdic-

tional line"); see also Hayes v. United States, 464 F.2d 1252, 1258 (5th Cir. 1972). As the Court's statements in Hill and Sunal indicate, a jurisdictional claim is by its very nature fundamental, and cannot be characterized as a trivial error like that in Hill. A jurisdictional claim may be raised regardless of whether the claim was raised on direct appeal, a clear distinction from Sunal, where failure to appeal must be justified. Compare Kaufman, supra (where the Court ruled that a constitutional claim may be raised regardless of whether the claim was raised on appeal).

In the instant case, the court was without jurisdiction to impose sentence on petitioner on Indictment 74 Cr. 1152. The plain and unequivocal language of Article IV(e) provides that upon violation of the Article's terms, the indictment "shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." As this Court indicated in Cyphers, supra at 635, this section, by its very language, appears to be self-executing. No defense motion is required to claim a remedy under Article IV(e). There are no contingencies, no procedural requirements, and no exceptions written into Article IV(e). The only possible construction of the statute is that the indictment loses all force and effect when Article IV(e) is violated, not when such violation is claimed, and that the court is required to dismiss the indictment whenever such violation is discovered. If the indictment had no force or effect, the court could not have had jurisdiction to try and sentence Robert Enright.

The jurisdictional nature of the claim herein is demonstrated by this Court's decision in Cyphers, supra. In that case, appellant Ferro raised, on his direct criminal appeal, the same claim raised herein -- that he had been transferred from state to federal custody twice before his federal trial,



in violation of Article IV(e), see id. at 634. The government argued that he should not be permitted to raise this claim for the first time on appeal. The Court found that Ferro had not waived his claim by failing to raise it in the District Court, explaining that Article IV(e) does not impose any requirement that a defendant request relief. Id. at 634-35.

On finding that appellant Ferro had stated a violation of Article IV(e), the Court of Appeals simply ordered the indictment dismissed with prejudice. Id. at 635, 637. The Court did not remand the claim for the District Court's consideration, or even to allow the District Court the opportunity to order the indictment dismissed. This action implies that violation of Article IV(e) imposes a bar to prosecution, such that any court with jurisdiction over the offense must enter the order of dismissal mandated by Article IV(e) whenever such violation is discovered. See also Ford, supra at 743-44.

The language of Article IV(e) is most naturally interpreted as creating a bar to prosecution. Any other construction would impose restrictions and requirements which Congress did not endorse, and would change the meaning of the section. See Blasius, supra. Further, Article IX of the Agreement mandates liberal construction. See Cyphers, supra at 635.

Thus, in addition to raising a claim under §2255 that petitioner-appellee is in custody in violation of a law of the United States, Enright's claim herein should be cognizable as a jurisdictional defect.

### III. PETITIONER-APPELLEE'S CLAIM HAS NOT BEEN WAIVED.

#### A. Petitioner-Appellee Did Not Deliberately Bypass His Procedural Remedies.

In Cyphers, supra, this Court determined that a claim under Article IV(e) is not waived by failure to raise the claim in the District Court. Id. at

634-35. The Court explained that a claim under the Agreement is not governed by the waiver provision of Rule 12(f) of the Federal Rules of Criminal Procedure. Id. at 634. Noting that Article IV(e) "makes no reference to a request by the prisoner and says 'if trial is not had on any indictment . . . prior to the prisoner's being returned to the original place of imprisonment . . . such indictment . . . shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice,'" the Court concluded that appellant could raise his claim for the first time on appeal. Id. at 634-35.

Thus, Robert Enright did not waive his claim by failing to raise it in the District Court during the underlying criminal proceeding. The question then becomes whether failure to raise the claim during the direct criminal appeal herein constituted a waiver.

In Sunal, supra, the Supreme Court ruled that an unjustifiable failure to raise a claim on direct appeal may, absent unusual circumstances, preclude that claim from being considered on a §2255 motion. See Davis, supra at 345. The test historically applied to determine whether failure to raise a claim on appeal is unjustifiable is the deliberate bypass standard set forth in Fay v. Noia, 372 U.S. 391, 438-39 (1963). See Kaufman, supra at 220 n.3, 227 n.8; Sanders v. United States, 373 U.S. 1, 18-19 (1963); Loschiavo, supra at 666; see also Williams v. United States, 463 F.2d 1183, 1184-85 (2d Cir.), cert. denied, 409 U.S. 967 (1972). Although Sunal, supra, is often quoted for the proposition that a §2255 motion "will not be allowed to do service for an appeal," id. at 178, the Supreme Court's holding in Sunal was based on a finding that the petitioner therein "chose" not to appeal or, in other words, deliberately bypassed his appeal. See id. at 181; Developments,



supra at 1067-68. Thus, Sunal is completely consistent with the Supreme Court's later statements of the applicable principles.

As the Supreme Court commented in Kaufman, supra at 228, there is "no reason . . . to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations." For this reason, the test of Fay v. Noia, which determines whether state prisoners may assert in a federal habeas corpus proceeding claims not previously raised, also applies to federal litigants. This standard has been defined in some detail:

If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of [raising his claim in the state courts, or by analogy, on direct appeal], whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state [or appellate] procedures, then it is open to the federal court on habeas to deny him all relief . . . -- though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default . . . At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief.

(Fay v. Noia, supra at 439[citations omitted])

Commentators have suggested that the deliberate bypass standard should be applied to favor consideration of any claim of an inherently personal right. See Developments, supra at 1111. This is because there can be no plausible strategic reason for failing to raise such claims during trial or direct appeal. The only conceivable reason for not raising such a claim is ignorance of the claim. Therefore, the policy of deterring piecemeal litigation, the

aim of Sunal and the deliberate bypass rule, cannot be furthered by refusing to hear such claims at a later proceeding. While litigants can be deterred from purposely withholding claims for strategic reasons in the expectation that they will be able to raise them in a later proceeding, there is no deterrent function served where a procedural default was inspired only by ignorance. Thus, the courts should hear claims on collateral attack despite a forfeiture by counsel "if it appears that there was no strategic motive for the bypass and that the petitioner did not knowledgeably acquiesce in the decision." Developments, supra at 1112.\*

The question of whether failure to raise a claim was deliberate is a factual question and the District Court herein found, after an evidentiary hearing, that Robert Enright did not waive his rights under the Interstate Agreement. (JA at 173-75). This conclusion was based upon testimony at the hearing that Enright was not aware of his rights under Article IV(e) until he read about the Mauro decision in the newspaper, long after his trial and appeal were over. (JA at 143). This factual finding, based upon the District Court's conclusions about the credibility of live testimony, is clearly well-supported.

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\* Wainwright v. Sykes, \_\_\_ U.S. \_\_\_, 97 S.Ct. 2497 (1977), holding that a state prisoner who had waived his right to challenge the admissibility of his confession at his state court trial thereby waived his right to raise this claim in a federal habeas corpus proceeding, does not render the Fay v. Noia standards inapplicable in this case. The Supreme Court rejected the Fay v. Noia standard only as it applied to a state petitioner who wished to raise a claim regarding the conduct of his state court trial. The Court's reasoning focused primarily on considerations of comity, and respect for state procedural rules, in this case, a contemporaneous objection rule, see id. at 2506-08. The Court left open the question of whether the validity of Fay v. Noia could also be questioned in other contexts. Id. at 2507 n. 12.



Furthermore, Enright cannot be charged with a procedural default based on his failure to raise this issue on appeal because his attempt to appeal his conviction was frustrated when his court-appointed counsel filed a brief pursuant to Anders v. California, supra, and moved to be relieved as counsel on the ground that there were no nonfrivolous issues to be raised on appeal. See Enright v. United States, 75-1235 (2d Cir. 1975). In Anders, the Supreme Court placed the responsibility for reviewing such motions to be relieved on the courts, and stated that it is the court's obligation to fully examine the proceedings below in order to determine whether an appeal would be wholly frivolous. Anders, supra at 744-45. Thus, the court must decide whether there are any nonfrivolous issues to be raised on appeal and, if counsel has missed a viable issue, must assign new counsel to argue the appeal. Id. The documentation for Enright's claim of violation of his rights under Article IV(e) is in the District Court record on Indictment 74 Cr. 1152. The discussion at pp.5-6, supra, shows that Enright would have had not only a nonfrivolous, but an unanswerable claim had this issue been discovered on appeal. After Enright's counsel filed an Anders brief, Enright was in the position of a pro se litigant, and could only look to the court for assistance in learning whether there were any viable claims to be raised on his appeal. However, the court granted the motion to be relieved and affirmed Enright's conviction apparently without considering this claim. Compare Ricketson, supra at 372, where the Seventh Circuit sua sponte requested argument on a possible violation of appellant's rights under the Interstate Agreement, on a direct criminal appeal.

Therefore, Enright's direct appeal was frustrated because he was not aware of what legal bases there might have been for an appeal, and neither

his assigned counsel nor the court advised him of this potential issue. The direct appellate proceeding proved inadequate in Enright's case, and collateral relief should not be foreclosed simply because this <sup>present</sup> litigant was unaware of his potential legal claims.

In the alternative, the fact that Enright never had a plenary direct appeal offers another procedural option for allowing Enright his first opportunity to present his claim to this court: the court could reinstate his appeal on the ground that his right to appeal was "frustrated," and that he was effectively deprived of his right to appeal. See Rodriguez v. United States, 395 U.S. 327 (1969); United States ex rel. Williams v. LaVallee, 487 F.2d 1006, 1010 (2d Cir. 1973), cert. denied, 416 U.S. 419 (1974); United States ex rel. Smith v. McMann, 417 F.2d 648, 654 (2d Cir. 1969) (en banc), cert. denied, 397 U.S. 925 (1970).<sup>\*</sup> Counsel's motion to be relieved was granted and Enright's conviction summarily affirmed on the assumption that there were no nonfrivolous issues to be raised on his appeal. It now appears that this assumption was incorrect; that there was a substantial issue to be raised, and that Enright should have been assigned counsel to argue this issue. Therefore, reinstatement of the appeal would be appropriate.

B. The District Court Properly Found that Petitioner-Appellee Did Not Waive His Rights Under the Interstate Agreement on Detainers.

The Government has also argued that the actions of Enright's trial counsel in telephoning the Assistant United States Attorney constitute a

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<sup>\*</sup> Where the right to appeal has been frustrated, it is not relevant whether assigned counsel was competent or not competent, see Smith, supra at 655.



waiver of Enright's rights under the Agreement. Judge Metzner found, after an evidentiary hearing, that Enright did not waive his rights. (JA at 173-75).

In Mauro, supra at 591 n.3, this Court stated that any purported waiver of rights guaranteed by Article IV(e) of the Interstate Agreement on Detainers is to be judged by the familiar standard of Johnson v. Zerbst, 304 U.S. 458, 464 (1938): to be effective as a waiver, "it must have been an 'intentional relinquishment or abandonment of a known right or privilege.'" Mauro itself provides an example of the application of this standard. In Mauro, appellee Fusco personally, in open court, requested that he be returned to state custody prior to his federal trial. The Government charged that Fusco had thereby waived his rights under Article IV(e). This Court found that Fusco's action did not constitute a waiver because the record was "barren of any indication" that Fusco's request had been an intentional relinquishment or abandonment of a known right. Id. at 591 n.3. See United States v. Randall, 429 F.Supp. 18, 20-21 (D.D.C. 1977).

In this case, the record is not silent on the question of whether Enright knowingly or intentionally relinquished a known right -- the District Court has found as a matter of fact that he did not.

Further, an effective waiver under the Johnson v. Zerbst standard must be the choice of petitioner, not of his counsel. Fay v. Noia, supra at 439; Humphrey v. Cady, 405 U.S. 504, 517 (1972). Thus, the Supreme Court stated that in examining a purported waiver by counsel, a court must determine first, the reason for counsel's action and, second, "the extent of petitioner's knowledge and participation in that decision." Humphrey, supra at 517. See United States ex rel. Snyder v. Mazurkiewicz, 413 F.2d 500, 502 (3d Cir. 1969); Floyd v. United States, 365 F.2d 368, 377 n.15 (5th Cir. 1966); Mitchell v.

Stephens, 353 F.2d 129, 140-141 (8th Cir. 1965), cert. denied, 394 U.S. 1019 (1966); Cobb v. Balkcom, 339 F.2d 95, 101-02 (5th Cir. 1964); United States ex rel. Eidenmuller v. Fay, 240 F.Supp. 591, 594 (S.D.N.Y. 1965), cert. denied, 384 U.S. 964 (1966); United States ex rel. Alexander v. Fay, 237 F.Supp. 142, 148 (S.D.N.Y. 1965); United States ex rel. Noll v. Fay, 219 F.Supp. 262, 267-68 (S.D.N.Y. 1963). (See discussion in Petitioner's Post-Hearing Memorandum, JA at 104-16).

Robert Enright neither knew of nor participated in any decision made by his trial counsel. Enright testified at the evidentiary hearing below that he had never authorized his counsel to request his return to state custody, and never even knew that his counsel discussed the subject of a transfer with the Assistant United States Attorney. (JA at 135-43). He also testified as to a number of extremely cogent reasons why he wished to remain in federal custody until his trial was concluded: his return to state custody meant a return to confinement in the restrictive conditions of a punitive segregation unit of a maximum security institution, as opposed to the relative freedom of the Federal Detention Headquarters at West Street. (JA at 140). As Judge Metzner commented during the hearing, "I would assume nobody wants to go back to segregation." (JA at 141.) His return to state custody placed him in a position where he was unable to confer with this trial attorney about his forthcoming trial. (JA at 141-142). Finally, Enright actively desired a speedy resolution of the federal charges against him, as shown by his request to the court for a speedy trial. (JA at 13, 133, 139).\*

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\* A retrospective determination of this waiver question was required herein because of the Government's failure to have Robert Enright produced in open court in connection with the satisfaction of the original writ of habeas corpus ad prosequendum, cf. §IV(c) of the Agreement (requiring that any requests for adjournments of proceedings governed by the Agreement be made in open court), and its decision to seek satisfaction of the writ from the Part I

(Footnote continued on next page) . . .



The District Court's finding of fact was clearly correct. There was ample basis for concluding that the Johnson v. Zerbst standard was not met and that Enright did not waive his rights under the Interstate Agreement on Detainers, and absolutely no evidence to the contrary. Therefore, the District Court properly reached the merits of Enright's claim and the decision granting his motion pursuant to 28 U.S.C. §2255 must be affirmed.

#### CONCLUSION

FOR THE REASONS STATED, THE DISTRICT COURT'S ORDER GRANTING ROBERT ENRIGHT'S MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. §2255 SHOULD BE AFFIRMED.

Dated: New York, New York  
January 9, 1978

Respectfully submitted,

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judge, rather than the judge to whom the case was assigned. (JA at 163-64). Had Enright been produced in open court, Judge Metzner would have had the opportunity to discover that he did not wish to be returned to state custody, and was not voluntarily waiving any rights because he did not know of his rights. On both occasions where this Court has considered possible waivers of claims under the Agreement, this procedure had been followed: both John Fusco and Richard Ford personally requested, in open court, that they be returned to state custody. See Mauro, *supra* at 591 n.3; appellant's reply brief in Ford, *supra* at 6. That waiver of any significant procedural right must occur in open court is hardly a novel idea in light of the consistent provisions of the Federal Rules of Criminal Procedure, see, e.g., Rules 7, 10, 11(c), (d) and (e), 20, 23(a). Thus, the problem in this case could easily have been resolved had the Government taken the simple precaution of having Robert Enright produced in open court before Judge Metzner prior to asking that the writ be satisfied.